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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

Augustus L. Berry,

Petitioner,

v.

State of North Carolina,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

PETITION FOR WRIT OF CERTIORARI

****

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The petitioner, Augustus L. Berry, prays that a writ of certiorari issue to review the judgment made by the North Carolina Court of Appeals, entered December 29, 1971, affirming the conviction of the petitioner by the Superior Court Division, General Court of Justice of Guilford County, North Carolina, which judgment the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari and dismissal of appeal entered March 7, 1972.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is appended to this petition. Petition for writ of certiorari

to review this decision was denied by the Supreme Court of North Carolina, without opinion. A copy of this order denying certiorari is appended to this petition.

JURISDICTION

The judgment of the Superior Court Division, General Court of Justice of Guilford County convicting petitioner of the crime of conspiracy to assault a public officer and assaulting a public officer with a firearm, was made and entered on June 11, 1971. Petitioner's relief in the North Carolina courts was exhausted upon the affirmation of his conviction in the North Carolina Court of Appeals on December 29, 1971 and upon denial of petition for writ of certiorari to review this judgment by the Supreme Court of North Carolina on March 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

I. Whether the petitioner was denied his fundamental right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

II. Whether the conviction of the petitioner for both conspiracy to assault and for assault was in violation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States as applied against the States under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT V.

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action arose in the Superior Court Division of the General Court of Justice of Guilford County, North Carolina. Petitioner was charged under two indictments. One indictment (No. 70-CR-33309) charged that the defendant together with certain others conspired to assault Ralph Gene Tucker, a law enforcement officer, "then and there in the performance of his assigned duties." That indictment also charged that the petitioner "did assault Ralph Gene Tucker by shooting a .22 caliber rifle at him from a window of the King Cotton Hotel." A second indictment (No. 70-CR-25045)

charged that the petitioner did assault Ralph Gene Tucker, a law enforcement officer "then and there in the performance of his public duties." The indictment in 70-CR-25045 involved the same assault charged in the first indictment and was "nol prossed."

Petitioner was tried during the May 31, 1971, regular criminal session of the Superior Court Division of the Guilford County General Court of Justice, North Carolina. Prior to trial petitioner's counsel made timely and appropriate motion to dismiss the prosecution on the grounds that the petitioner had been denied his right to a speedy trial. Motion was also made on behalf of petitioner prior to trial to require the State either to dismiss the charges against petitioner or to elect to try him for either conspiracy to assault or for the assault, since to try him for both would be violative of the double jeopardy provisions of the United States and North Carolina Constitutions. Both motions were denied.

A warrant for the arrest of the petitioner had been issued on December 12, 1969, and the petitioner was apprehended in February, 1970. Petitioner was held in jail for 53 days before being released on bail. He was released only after the bail was reduced to an amount which he could pay. Petitioner's case was set for trial four times before it was finally tried during May 31, 1971, criminal session. These trials were scheduled on February 23, 1970; December 9, 1970; February 24, 1971; and April 15, 1971. In each of these

instances the State requested a continuance. The petitioner never requested a continuance. The petitioner was from Washington, D. C., and he made the trip from Washington, D. C. to Greensboro for each of these trials, except the one in February, 1970, at which time he was in prison, having not been able to make bail at that time, and the trial in April, 1971, when the State notified him that they would continue the case and therefore it was not necessary for him to appear.

The State sought a continuance at the time of the first trial so that they might try the petitioner with three other defendants who were being indicted for the same conspiracy to assault a police officer. On two other occasions the State sought continuances because their ballistics expert had a severe back problem and had been hospitalized. However, petitioner's attorney had agreed to allow the report of the ballistics expert into evidence without requiring that the expert be present. The State refused to do this on the grounds that it would prefer to have the live testimony of the ballistics expert. The State could not recall why it had sought the continuance at the time of the other trial.

At the trial of the case the petitioner entered a plea of not guilty to both charges in the first indictment. The State offered the testimony of Officer R. Gene Tucker of the Greensboro Police Department, who testified that on December 12, 1969, as he was driving his patrol car in the downtown area of Greensboro, North

Carolina, a shot was fired which struck his patrol car. He testified that he believed the shot came from the King Cotton Hotel, but that he had no way of knowing if the shot was actually fired from the King Cotton Hotel or, if it was, from which of the 72 to 84 windows visible in the King Cotton Hotel the shot was fired.

Some time later that evening (at least 45 minutes after the shooting) other officers of the Greensboro Police Department were sent to search the top floor of the King Cotton Hotel. As one officer proceeded down the hall he heard boisterous laughter emanating from Room 1404. Over objection, this witness was allowed to testify that the first distinct words he heard from the room were "I bet that _____ jumped" and later that the same voice said "We sit up here every night figuring out how we're going to f--- up Greensboro." He testified that the statements were not made by the petitioner, but that the room from which they were coming was being rented by the petitioner. The officer entered the room and ascertained that there was a clear line of sight from the window to where Officer Tucker's patrol car had been hit. However, he testified that there were many other rooms in the King Cotton Hotel which would have a good clear line of sight down to the point where the patrol car was hit. The police then searched the room but found no weapon and the petitioner told them that he didn't have any guns.

The police later found a .22 Marlin rifle behind a small door in a plumbing

access space about halfway between the petitioner's room and another room down the hall. The State's ballistics expert testified that he test fired this rifle and compared the test bullet with the bullet found in Officer Tucker's patrol car. He testified that in his opinion the bullet found in Officer Tucker's patrol car was fired from the rifle found in the King Cotton Hotel.

Major E. R. Wynn of the Greensboro Police Department, also testifying for the State, stated that the petitioner met with him on December 12, 1969, and told him that the rifle which the police had taken from the plumbing access space on the fourteenth floor of the King Cotton Hotel belonged to him.

At the close of the State's evidence, the petitioner moved for a judgment of nonsuit on the grounds that there was insufficient evidence as a matter of law to warrant submission of the case to the jury on either of the counts in either bill of indictment. The motion was overruled. The petitioner elected to offer no evidence and renewed his motion for nonsuit made at the close of the State's evidence. The jury returned a verdict of guilty on both counts and the petitioner moved to set the verdict aside on the grounds of insufficient evidence to justify the conviction. This motion was also denied. Prayer for judgment was continued as to the first count of the bill of indictment (conspiracy to assault a public officer). On the charge of assaulting a public officer with a

firearm, petitioner was sentenced to be imprisoned for a maximum term of four years as a youthful offender.

Petitioner appealed his conviction to the North Carolina Court of Appeals. The North Carolina Court of Appeals affirmed petitioner's conviction in an opinion filed December 29, 1971. Petitioner then appealed the decision of the North Carolina Court of Appeals and petitioned for a writ of certiorari to review this decision to the Supreme Court of North Carolina. The Supreme Court of North Carolina dismissed the appeal ex mero motu for lack of a substantial constitutional question and denied the petition for a writ of certiorari on March 7, 1972.

ARGUMENT

The decision below should be reviewed because the North Carolina Court of Appeals decided a federal question of substantial importance about which there is great dispute between the States, and decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

The first issue raised in this petition for certiorari is whether, in consonance with the Sixth and Fourteenth Amendments to the Constitution of the United States, the petitioner was denied his right to a speedy trial. The second issue raised in this petition for certiorari is whether the petitioner was twice placed in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments to the Constitution of the

United States. The North Carolina Court of Appeals held that the petitioner had not been denied his right to a speedy trial and had not been placed twice in jeopardy for the same offense.

1. The petitioner's right to a speedy trial was abridged by the State's deliberate and unnecessary delay in prosecuting the petitioner.

Prior to the start of petitioner's trial, motion was made on behalf of petitioner to dismiss the prosecution because the petitioner had been denied his right to a speedy trial. It was shown that though the warrant in this action had been issued on December 12, 1969 and the petitioner had been arrested in February, 1970, the State had by securing four continuances been able to delay the trial until the second week of the May 31, 1971, criminal session of the Guilford County Superior Court.

The right to a speedy trial is a fundamental right, the violation of which requires dismissal of the charges against petitioner. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). The guarantee of a speedy trial is designed to (1) "minimize anxiety and concern accompanying public prosecution," United States v. Ewell, 313 U.S. 116, 120 (1966); (2) negative the effect of a lengthy prosecution subjecting the accused to "public scorn and deprive him of employment, and almost certainly [to]...force curtailment of his speech, associations, and participation in unpopular causes," Klopfer v. North Carolina,

supra at 222; and (3) protect the defendant from witnesses and physical evidence becoming unavailable, and from fading memories of those who testify, Dickey v. Florida, 298 U.S. 30 (1970). The first two of these factors are inherent whenever there is a great delay between the date the charge is made and the date the accused is tried. The third factor is present in many, if not most, protracted prosecutions, but its existence is not always readily documented; for instance, it is difficult to demonstrate that the memory of a particular witness has faded. Mr. Justice Brennan, concurring in Dickey v. Florida, supra at 55, has suggested that delay in itself should be regarded as a prima facie violation of the Sixth Amendment, and it should be left to the government to establish harmless error, as in other cases of denial of constitutional rights.

Though it has been stated by some courts that there must be a showing that the accused has been prejudiced by the delay, State v. Ball, 277 N.C. 714, 178 S.E.2d 377 (1971), this requirement must be rejected since there is no such requirement in the Sixth Amendment. The drafters of the Sixth Amendment assumed that the mere delay of a person's trial was inherently prejudicial. Thus the Sixth Amendment does not provide that a person must be prejudiced by the lack of a speedy trial, but provides only that "In all criminal prosecutions, the accused shall enjoy the right to a speedy...trial...." U.S. Const. Amend. VI. The petitioner, therefore, should not be required to show that he was prejudiced by the lack of a speedy

trial. At least one circuit court of appeals has reached this conclusion, stating: "The Government argues that appellant has not made a convincing demonstration that the delay prejudiced him in the presentation of his case and, although we agree, we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment." United States v. Lustman, 258 F.2d 475, 477-78 (2d Cir.), cert. denied, 358 U.S. 880 (1958). Many state courts and state legislatures recognize this fact and completely disregard as a factor whether the defendant has been prejudiced by the delay or not. See e.g. People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932). In fact, the rule in at least five states (California, Florida, Illinois, New Mexico, and New York) and the District of Columbia, is that defendants must be tried within a certain period after their arrest or they may not be tried at all.

Even were there a showing of prejudice required, the petitioner could make this showing fairly easily. One of the purposes behind the Sixth Amendment's guarantee of a speedy trial is to limit the possibilities that long delay will impair the ability of an accused to defend himself. It is obvious that the longer the delay the greater the chance that the witnesses' memories will become dulled, which can result in serious and perhaps critical lapses or misstatements. People v. Prosser, supra. Just a brief look through the record discloses a number of occasions on which witnesses were vague as to details or

actually forgot what had happened. Thus Officer Tucker on cross examination when asked whether he had made certain statements in the District Court in February, 1970, stated: "I don't remember whether I said that when the second shot was fired, I was looking straight ahead on Friendly at that time." Also on cross examination Officer Wynn, upon being asked whether he had asked the petitioner if the petitioner had fired the rifle or had had anything to do with the shooting of the patrolman's car, answered: "I may have, sir. I don't remember that." Similar lapses of memory can be found throughout the record.

Even if the prejudice to the petitioner is to be considered in determining whether the petitioner has been denied his right to a speedy trial (and petitioner still contends that a showing of prejudice is not required by the Sixth Amendment), it is but one factor to be considered among many. Other basic factors to be considered include who caused the delay and whether the causes for the delay were reasonable.

In the case before us there was an atypical delay deliberately and unnecessarily caused by the State. The State could not even recall why it had sought and obtained a continuance in February, 1971. And the continuances in November, 1970, and April, 1971, were sought and obtained because one of the many witnesses for the State was ill; and this was done even though petitioner's counsel had agreed to allow this witness' report into evidence without requiring the witness to be present.

Presumably, if this witness' back was still bothering him, the petitioner would still be waiting to be tried. Thus, the delay was solely and deliberately caused by the State and, in light of the fact that defense counsel agreed to allow the witness' report into evidence even though he was absent, the delay was totally unnecessary.

Once the accused has shown the delay was caused by the State, the Sixth Amendment's protections clothe the accused and, unless the State can show that the accused has intentionally and knowingly waived his constitutional right to a speedy trial, the action against the accused must be dismissed. The State contends that the accused waives his right to a speedy trial if he does not demand trial or resist postponement. State v. Hollars, 266 N.C. 45, 145 S.E.2d 309. However, a strong minority of courts have, by looking to the policies underlying the Sixth Amendment's right to a speedy trial, rejected the demand doctrine and now hold that the accused is not required to take any affirmative action in order to preserve his constitutional right to a speedy trial. United States v. Dillon, 183 F.Supp. 541 (S.D.N.Y. 1960); People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); State v. Crosby, 217 Or. 393, 342 P.2d 831 (1959); Hicks v. People, 148 Colo. 26, 364 P.2d 877 (1961); State v. Carrillo, 41 Ariz. 170, 16 P.2d 965 (1932); State v. Hess, 180 Kan. 472, 304 P.2d 474 (1956); Flanary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 (1945); Ex Parte Chalfant, 81 W.Va. 93, 93 S.E. 1032 (1917); Zehrlent v. State,

230 Ind. 175, 102 N.E. 2d 203; 21 Am. Jur. Criminal Law, Sec. 254. Among the reasons advanced for this view are that it is the State which initiates the proceeding and should have the burden of carrying it through, that the defendant is not empowered by statute to bring the case on for trial, and that the defendant should not have to make any demand for a speedy trial since the Constitution makes that demand for him.

The federal courts have generally recognized exceptions to the demand doctrine, both in cases where it would be manifestly unfair to condition the defendant's rights upon a demand that he lacks the means, knowledge, or capacity to make, and in those cases where the demand would serve no useful purpose in expediting a speedy trial. See Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1608 (1965). With that in mind, to insist that petitioner make a demand for speedy trial in the circumstances of this case would disregard reality. There was no time during the entire delay when the trial was not set on the calendar. How could the petitioner have demanded a speedy trial when he was constantly promised one? "The defect was not that the court failed to grant appellant a speedy trial date, but that it granted him too many speedy trial dates and failed to keep them." King v. United States, 265 F.2d 567, 573 (D.C. Cir. 1959) (Bazelon, J., dissenting).

Finally, the petitioner's failure to demand trial cannot be allowed to constitute a waiver of his right to a speedy

trial, since mere silence on the part of an accused cannot be considered a waiver of a fundamental right. The right to a speedy trial is just such a fundamental right. Klopfer v. North Carolina, supra. The United States Supreme Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege," and has declared that every reasonable presumption will be indulged against a waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). It also has pointed out that mere silence of the record raises no presumption of waiver, and that waiver cannot be found in the absence of some affirmative conduct on the part of a defendant evidencing a deliberate and conscious rejection of a constitutional guarantee. Carnley v. Cochran, 369 U.S. 506 (1962). "The demand doctrine is objectionable not only because it places the burden of procuring a speedy trial upon the accused rather than on the Government, but also because it is based upon a fictional theory of waiver that appears to be unconstitutional by present standards. Although the demand doctrine is still well entrenched, it is out of step with the Supreme Court's definition of waiver relating to other fundamental rights. In Johnson v. Zerbst the Supreme Court formulated the now classic definition of waiver as the 'intentional relinquishment or abandonment of a known right or privilege.' The demand doctrine, however, implies waiver from a silent record, although silence is at best an ambiguous test consistent with the possibility that defendant neither knew of his

right to speedy trial nor intentionally relinquished it. Although the Court has said that it will 'indulge every reasonable presumption against waiver' and will 'not presume acquiescence in the loss of fundamental rights,' the demand doctrine is based on exactly the contrary of these principles....The demand doctrine presupposes that failure to demand trial is a deliberate choice for supposed advantage on the assumption that delay always benefits the accused, but the delay does not inherently benefit the accused any more that it does the state. Consequently, a man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand." Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1609-10 (1965), (citations omitted).

The record below is silent as to waiver and the State has presented no evidence whatsoever that the petitioner intentionally and knowingly waived his right to a speedy trial. In fact, the only evidence appearing in the record on this issue is that the petitioner offered to allow the report of the State's witness into evidence, even though he would not be present at the trial, rather than have the trial continued.

Even in those cases where defendants purposefully do not demand a speedy trial, the demand doctrine should have no validity. "There can only be waiver where a viable choice exists, and that choice does not exist in speedy trial cases. Where there

is delay in bringing a case to trial and a decision not to prosecute is possible, it is unrealistic to force a man to demand the very thing which he is trying to avoid. As eloquently stated in United States v. Chase, [135 F.Supp. 230, 233 (N.D. Ill. 1955)] 'to require a man to beg for a trial on such a charge, with its enormous penalty, requires too much of human nature.' Since a man is, in theory, presumed innocent until proven guilty, the Government should bear the burden of bringing the defendant speedily to trial." Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1610 (1965) (citations omitted).

In view of the decisional conflicts among the states and in view of the importance of the speedy trial issue presented, there is a pressing need for this Court to review the decision of the court below. Whether there must be a showing that the delay in bringing the petitioner to trial prejudiced the petitioner, who has the burden of proving the prejudice or absence thereof, and whether the petitioner must demand a speedy trial or be found to have waived his right to such, are all important questions which must be answered so that the Sixth Amendment to the Constitution of the United States can be given uniform effect and treatment throughout the states. The petitioner's case offers an excellent opportunity for this Court to establish firm guidelines as to what standards are to be considered when determining whether a defendant's right to speedy trial has been abridged.

These standards have not heretofore been established by this Court, and this case should be reviewed so that those standards can be considered.

2. The conviction of the petitioner for both conspiracy to assault and for assault was in violation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States as applied against the States under the Fourteenth Amendment to the Constitution of the United States.

Petitioner was indicted and convicted for both conspiracy to assault a public officer and assaulting a public officer with a firearm. Since in this particular case the facts alleged in support of the indictment for conspiracy to assault a public officer would be sufficient to sustain a conviction under the indictment for assault on a police officer, the petitioner was placed twice in jeopardy for the same offense, and, therefore, his conviction must be reversed and the charges against him dismissed. Prior to trial petitioner's counsel made timely and appropriate motion to force the State to elect whether it would try petitioner for conspiracy to assault or for the completed crime of assault, or, if this election was not made, to dismiss the charges as being in violation of the double jeopardy provisions of the United States and North Carolina Constitutions; said motions were improperly denied. While successive prosecutions for the same acts by federal and state governments, as separate sovereigns, are permissible, Bartkus v.

Illinois, 359 U.S. 121 (1959), successive prosecutions in state courts for the same acts have been held impermissible. Waller v. Florida, 397 U.S. 387 (1970). The latter problem is involved in the present case. Here the petitioner was charged with both conspiracy to assault and assault. In this particular case the same acts of the petitioner were presented to the jury as proof of both offenses. Thus the State contended that the statements made in the petitioner's room and overheard by the police were proof of the conspiracy as well as proof of the assault (under the theory that all persons who are present at the place of the commission of the assault and are aiding, abetting or advising in its commission are principals.) There was no direct proof that the petitioner actually fired the gun. There was only circumstantial evidence that either he or someone in the room fired the gun. This very same circumstantial evidence was also the only evidence presented by the State to prove the conspiracy. In effect, the State is saying that here are certain actions attributable to the petitioner and these acts constitute both proof of a conspiracy to assault and proof of the assault. Such an attempt to convict petitioner under two separate statutes for the same acts occurring during one transaction is clearly in violation of the policies and intent of the double jeopardy provisions of the Fifth Amendment to the United States Constitution and the most recent cases decided under that provision.

It is true that formerly the rule has been that the charge of conspiracy to

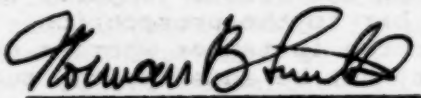
violate the law and the charge of consummation of the conspiracy by an actual violation of the law were charges of separate offenses and thus a plea of double or former jeopardy was not tenable. Pinkerton v. United States, 328 U.S. 640 (1946). However, it is also true that in those cases where the conspiracy and the completed act consist of the same elements then the double jeopardy clause acts as a bar to the prosecution. "There are of course instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of the two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." Pinkerton v. United States, supra at 643 (Citing United States v. Katz, 271 U.S. 354; and Gebardi v. United States, 287 U.S. 112). More importantly, these cases all came prior to the United States Supreme Court decisions in Benton v. Maryland, 395 U.S. 784 (1969) (applying the double jeopardy provisions of the Fifth Amendment against the States under the Fourteenth Amendment), and Waller v. Florida, supra (holding that successive prosecutions in state courts for the same acts violate the double jeopardy clause of the Fifth Amendment).

It is therefore clear under these recent decisions of the United States Supreme Court and under the peculiar fact situation in this case, that to charge the petitioner with both the crime of conspiracy to assault and the crime of assault is in violation of the Fifth Amendment to the United States Constitution as applied against the states by

the Fourteenth Amendment and requires a reversal of petitioner's conviction.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



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APPENDIX TO PETITION

No. 7118SC735 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Fall Session 1971

STATE OF NORTH CAROLINA

v. From Guilford

AUGUSTUS L. BERRY

Appeal by defendant, Augustus L. Berry, from McConnell, Judge, 31 May 1971 Session of Superior Court held in Guilford County.

The defendant, along with Edward Michael Smith, Bradford Belcher and Harry Fontleroy, was charged in a single two-count bill of indictment with conspiracy to assault a law-enforcement officer, and with assaulting a law-enforcement officer with a firearm, in violation of G.S. 14-34.2. The defendant, Augustus L. Berry, was tried alone on the two counts in the bill of indictment. Upon the defendant's plea of not guilty, the State offered evidence which is reviewed in the opinion. The defendant offered no evidence. The jury found the defendant guilty of both counts in the bill of indictment.

On 11 June 1971 the trial judge continued prayer for judgment until 6 September 1971 on the count in the bill of indictment wherein the defendant was charged with conspiracy to assault a law-enforcement officer.

From a judgment on the verdict imposing a prison sentence in the count in the bill of indictment charging the defendant with assault on a law-enforcement officer with a firearm, the defendant appealed to this Court.

Attorney General Robert Morgan and Associate Attorney Ronald M. Price for the State.

Smith and Patterson by Norman B. Smith, Michael K. Curtis and J. David James for defendant appellant.

HEDRICK, Judge. The defendant urges as error the court's denial of his motion for judgment as of nonsuit. In the second count charging the defendant with assaulting an officer with a firearm, the State offered evidence (except where quoted) tending to show the following: On 12 December 1969, at about 12:45 a.m., Ralph Tucker, an officer with the Patrol Division of the Greensboro Police Department, was on duty patrolling the Greensboro City streets in a patrol car. As the officer drove the patrol car west along Friendly Avenue approaching Davie Street, he "heard something that sounded like a gunshot or firecracker." When the officer heard the noise the driver's side of the automobile was facing the north side of the King Cotton Hotel. As the officer proceeded to drive the automobile along the street, he heard another shot which he said he believed came from the middle of the King Cotton "on up toward the left side". The second shot hit the glass in the rear door of the car on the driver's side. Officer

Tucker found a bullet in the automobile. According to Officer Tucker's testimony, about half or more of the King Cotton Hotel and between 72 and 84 of its windows were visible from where he was when the shot was fired. Forty-five minutes after Officer Tucker reported the shooting incident and the damage to the patrol car, police officers went to the fourteenth floor of the King Cotton Hotel where they heard boisterous laughter emanating from room 1404. When someone opened the door from inside the room, the officers entered and learned that the room was being rented by the defendant. One of the police officers testified that from a window in the defendant's room he could look straight into Friendly Avenue at the Daily News Building. When the officers asked the defendant for permission to search his room, the codefendant Edward Michael Smith, who was not tried with the defendant Berry, asked the officers if they had a search warrant. The officers again asked the defendant Berry if they might search his room, and the defendant Smith again asked if they had a warrant. The officers then explained that since the defendant Berry rented the room, they were asking him for permission to search; whereupon, the defendant Berry asked the officers what they were looking for. When the officers explained that they were looking for a rifle, the defendant Berry told them that he did not have a gun and that they could search his room. The officers did not find a gun in the defendant's room; however, one of the officers found a loaded .22 rifle in a small service closet in the hall just outside the door to the defendant's room

which the officers took to the police station without the defendant's knowledge.

At 2:30 p.m., on 12 December 1969, the defendant Berry and Harry Fontleroy, a codefendant not tried with the defendant Berry, went to the Greensboro Police Station where they talked to Major Edmond Robert Wynn, Commanding Officer of the Patrol Division of the Greensboro Police Department. Major Wynn testified: "They identified themselves as Augustus Berry--and said he lived at 1404 King Cotton Hotel. And the other person said he was Harry Fontleroy and he resided at A & T and both were A & T students. . . . At this time I asked him what his complaint was. And he said, 'Well, they took my gun.' . . .

***

"At that time I asked Mr. Berry if he would describe the gun. And he described it as being a rifle, a Marlin .39A. He said it had rust spots on it and a chipped butt plate, that is, at the end of the rifle. And he mentioned that there was something wrong with the right front sight. And he also mentioned that it was a lever action type gun.

"He asked if we had the gun and could he have it back, and I asked him, 'Why,' and he stated that it was his gun. I told him that this gun was being held and would be processed and ultimately we would make some decision on it.

***

". . . I asked him later on why he was making a complaint--why he had come up here, he said he wanted to help with

matters, and I asked him, 'Along what line,' and he said he wanted to get the matter straightened out. I then asked him if the officers talked to him about the gun the night before, and he said 'Yes, they did.' And I asked, 'What did you tell them about that.' And he said, 'I lied.' And I asked, 'About what,' and he said, 'I lied about the fact I did not have a gun.'

"As to whether he explained why he had lied to the officers the night before about the gun, he said he was mad; that he was mad about the fact that they had come to his room; that he was mad about the fact they had come into his room, and also mad about the fact that one of the officers had a shotgun.

***

"As to whether at that point, there was any conversation about the other persons in the room at the time the officers came there, Fontleroy said he was the second party and they had been in the room during the entire evene . . . ."

A Federal Bureau of Investigation ballistics expert testified that he test fired the Marlin .22 rifle taken from the closet outside the defendant's door in the King Cotton Hotel and compared the test bullet with the bullet found by Officer Tucker in the patrol car, and in his opinion the projectile found by Officer Tucker in the automobile was fired from the Marlin rifle claimed by the defendant.

When the foregoing evidence is considered in the light most favorable to the

State, we think it is sufficient to require the submission of the case to the jury on the count in the bill of indictment charging the defendant with assaulting a police officer with a firearm. The defendant's motion for judgment as of nonsuit was properly denied.

The defendant contends the court committed prejudicial error in its instructions to the jury on the count charging an assault with a firearm on a police officer. When the entire charge of the court is considered contextually, we find it correct and free from prejudicial error.

Defendant contends he was denied his constitutional right to a speedy trial. With respect to this contention, the record, in pertinent part, is as follows:

> "MR. SMITH: If your Honor please, the warrant in this action was issued on December 12, 1969, I believe. The defendant was apprehended in February of 1970, and he was held for fifty-three days in jail before being released on bond. He was under a very high bond, a bond that he couldn't make. And then the bond was lowered to a bond that he could make.
>
> He was from Washington, D. C., and he has come from Washington for each of these trials. They were scheduled February 23, 1970; December 9, 1970; February 24, 1971; and April 15, 1971, and

then again at the present session.

In each instance the State has requested a continuance. Never has the defendant requested a continuance. . . . And the continuances of this prosecution have been a bar and impediment to him in his normal life. And I think . . . that the prosecution ought to be dismissed on the grounds of the Sixth Amendment, a right to a speedy trial.

***

MR. ALBRIGHT: . . . .

The first time it was continued his client was in jail. And you, Mr. Smith, were advised of our intention to submit indictments for three other defendants, who are now jointly indicted. And we didn't oppose bond reduction. That was March, 1970, Term, other defendants were indicted.

On at least two other occasions, I have had an F.B.I. agent physically incapacitated. . . .

***

MR. SMITH: . . . .

On the other hand, I agreed with you that I would permit Mr. Popplеton's report in, if necessary.

> MR. ALBRIGHT: On the ballistics information, I would prefer to have his live testimony.
>
> . . . But I know in November and April the reasons for the State not calling the case was the physical handicap of Mr. Poppleton."

In State v. Ball, 277 N.C. 714, 178 S.E. 2d 377 (1971), Justice Moore, speaking for the North Carolina Supreme Court, said:

> ". . . The circumstances of each particular case determines whether a speedy trial has been afforded. Undue delay cannot be defined in terms of days, months, or even years. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by the defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution."

In the present case, the defendant has failed to show the delay in bringing him to trial was due to the neglect or willfulness of the State, or that he was in any way prejudiced by the delay. The record reveals legitimate and reasonable excuses for any delay in bringing this defendant to trial. The defendant's motion to dismiss was properly denied. See

State v. Cavallaro, 274 N.C. 480, 164 S.E. 2d 168 (1968); State v. Neas, 278 N.C. 506, 180 S.E.2d 12 (1971); State v. Wrenn, 12 N.C. App. 146, 182 S.E.2d 600 (1971).

We have carefully reviewed all of the defendant's assignments of error relating to the charge of assaulting an officer with a firearm, and we conclude that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

No. 111PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1971

****

STATE OF NORTH CAROLINA)
)
v.) From Guilford
)
AUGUSTUS L. BERRY)

****

Appeal dismissed ex mero motu for lack of substantial constitutional question.

Petition denied by order of the Court in Conference 7th day of March, 1972.

/s/ Moore, J.
Moore, J., For the Court

FILE COPY

Supreme Court, U. S.
FILED
OCT 18 1972

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 71-1567

AUGUSTUS L. BERRY,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 71-1567

AUGUSTUS L. BERRY,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

The respondent, the State of North Carolina, prays this Court not to issue a writ of certiorari to review the judgment of the North Carolina Court of Appeals, entered December 29, 1971, affirming the conviction of the petitioner by the Superior Court Division, General Court of Justice of Guilford County, North Carolina, upon which the Supreme Court of North Carolina dismissed the appeal and denied petition for certiorari by order of March 7, 1972.

QUESTIONS PRESENTED

I.

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER PETITIONER WAS TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE BY BEING TRIED FOR CONSPIRACY AND ASSAULT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF NORTH CAROLINA

North Carolina General Statute Sec. 14-34.2:

> § 14-34.2. *Assault with a firearm upon law-enforcement officer or fireman.*–Any person who shall commit an assault with a firearm upon any law-enforcement officer or fireman while such officer or fireman is in the performance of his duties shall be guilty of a felony and shall be fined or imprisoned for a term not to exceed five years in the discretion of the court. (1969, c. 1134.)

STATEMENT OF CASE

This case was tried at the May 31, 1971 Session of the Superior Court Division of the General Court of Justice of Guilford County, North Carolina, before His Honor John D. McConnell, Judge, and a jury, upon a two-count indictment charging the petitioner, Augustus L. Berry, with conspiracy to assault a law enforcement officer "then and there in the performance of his assigned duties", and with assaulting a law enforcement officer with a firearm, in violation of G.S. 14-34.2. The petitioner entered a plea of not guilty to both counts in the indictment and a verdict of guilty as charged was returned by the jury. Prayer for judgment was continued as to the first count in the bill of indictment (conspiracy to assault a law enforcement officer) and sentence was imposed upon the second count (assaulting a law enforcement officer with a firearm). From a judgment on the verdict imposing a prison sentence in the count in the bill of indictment charging the petitioner with assault on a law enforcement officer with a firearm, the petitioner appealed to the Court of Appeals of North Carolina.

A warrant was issued for the arrest of the petitioner on December 12, 1969. According to the testimony of Attorney Smith, the petitioner was apprehended in February, 1970, and remained in jail for 53 days before being released on bail. His case was set for trial and continued on February 23, 1970; December 9, 1970; February 24, 1971 and April 15, 1971. He was tried and convicted at the May 31, 1971 session of the Guilford County Superior Court. The continuances were granted upon requests by the State. Petitioner apparently made three trips from Washington, D. C. for the purpose of appearing at trial.

At the trial of the case the petitioner entered a plea of not guilty to both counts in the indictment. The State offered the testimony of Officer R. G. Tucker of the Greensboro Police Department, who testified that at 12:45 A. M. on December 12, 1969, as he was driving his patrol car in the downtown area of Greensboro, North Carolina, near the King Cotton Apartments, he heard a loud noise coming from the general area of the alleyway. As he began to investigate, he heard a noise that sounded like a gunshot or firecracker but could not determine the origin of the sound. He also heard loud talking. When the second shot rang out, the officer had determined that it came from the King Cotton Apartments in the middle of the building toward the left side as he looked at it. When the bullet struck, it hit the window glass in the left rear door, shattering the glass all over the patrol car being operated by Officer Tucker. After the second shot, the officer moved his automobile out of the line of fire and called for assistance. He then searched for and found the bullet on the rear floorboard by the seat. He noticed when he stopped his vehicle at the station that the left rear tire was flat.

Officers were dispatched to the King Cotton Apartments approximately 45 minutes after Police Captain Conrad Wade received notice of the shooting and the petitioner's room was searched with his permission after he was advised the officer was looking for guns and he denied having any guns. No weapons were found in the room itself but Officer J. D. Heffinger found a Marlin .22 caliber rifle in a small plumbing service space in the hallway outside petitioner's room. At the time the rifle was located, the hammer was in a cocked position with a bullet in the firing chamber and two in the magazine.

The State's ballistics expert testified that he test fired this

rifle and compared the test bullet with the bullet found in Officer Tucker's patrol car. He testified that in his opinion the bullet found in Officer Tucker's patrol car was fired from the rifle found in the King Cotton Apartments. It was determined that a projectile had entered the left rear tire of the patrol car.

Major E. R. Wynn of the Greensboro Police Department, also testifying for the State, stated that the petitioner met with him on December 12, 1969, and told him that the rifle which the police had taken from the plumbing access space on the fourteenth floor of the King Cotton Apartments belonged to him.

At the close of the State's evidence, the petitioner moved for a judgment of nonsuit on the grounds that there was insufficient evidence as a matter of law to warrant submission of the case to the jury on either of the counts in either bill of indictment. The motion was overruled. The petitioner elected to offer no evidence and renewed his motion for nonsuit made at the close of the State's evidence. The jury returned a verdict of guilty on both counts and the petitioner moved to set the verdict aside on the grounds of insufficient evidence to justify the conviction. This motion was also denied. Prayer for judgment was continued as to the first count of the bill of indictment (conspiracy to assault a public officer). On the charge of assaulting a public officer with a firearm, petitioner was sentenced to be imprisoned for a maximum term of four years as a youthful offender.

Petitioner appealed his conviction to the North Carolina Court of Appeals. The North Carolina Court of Appeals affirmed petitioner's conviction in an opinion filed December 29, 1971. Petitioner then appealed the decision of the North Carolina Court of Appeals and petitioned for a writ of certiorari to review this decision to the Supreme Court of North Carolina. The Supreme Court of North Carolina dismissed the appeal *ex mero motu* for lack of a substantial constitutional question and denied the petition for a writ of certiorari on March 7, 1972.

ARGUMENT

The decision below should not be reviewed because the decision of the North Carolina Court of Appeals was in line with a recent decision of this Court and correctly decided a question

of substantive law not in conflict with decisions of this Court.

There are two issues raised in the petition: first, whether the petitioner was denied his right to a speedy trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, and second, whether the petitioner was twice placed in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

I.

THE PETITIONER WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On December 12, 1969, warrant was issued for the petitioner and he was arrested in February, 1970. The State secured four continuances of trials set for February 23, 1970, December 9, 1970, February 24, 1971 and April 15, 1971. The case was tried at the May 31, 1971 criminal session of the Guilford County Superior Court.

The petitioner suggests that his case offers an "excellent opportunity" to this Court to set out guidelines, not heretofore established, to be considered when determining whether a defendant's right to speedy trial has been abridged. The recent case of *Barker v. Wingo*, ____U.S.____(1972), No. 71-5255, decided by this Court on June 22, 1972, sets out specific guidelines for such a case. In *Barker v. Wingo*, this Court rejected the rule that a defendant who fails to demand a speedy trial forever waives his right thereto and rejected inflexible approaches, such as requiring trial within six months after indictment, since such a requirement would amount to legislative activity by this Court. This Court has now unanimously adopted an approach whereby a balancing test must be applied weighing the conduct of both the prosecution and the defendant.

Four factors, together with such other circumstances as may be relevant, are to be considered: length of delay; the reason for the delay; the defendant's assertion of his right, and prejudice to the defendant.

1. *The length of delay*: From the date the warrant was issued until trial was between 17-18 months.

2. *Reasons for the delay*:

a. Though the warrant was issued on December 12, 1969, petitioner was not arrested until sometime in February, 1970.

b. Of a total of four continuances, all obtained by the State, one continuance was requested because indictments were then pending against other co-conspirators and two continuances were requested because a key ballistics witness for the State was ill. One continuance is unexplained, the one for February 24, 1971, but it caused only roughly a two-month delay since the case was reset for April 15, 1971.

3. *Defendant's assertion of his right*: Clearly, by the language of *Barker v. Wingo*, supra, the petitioner had an obligation to assert his right to a speedy trial, and failure to assert the right "will make it difficult for a defendant to prove that he was denied a speedy trial." The record does not disclose any objections by petitioner to the continuances obtained by the State. Petitioner argues that counsel agreed to allow the witness' testimony in without his being present in person. The State should not be compelled to present a weakened case, a case where the jury is deprived of the opportunity to observe the demeanor of the witness, because the defendant is willing to stipulate to the testimony. In *State v. Cavallaro*, 274 N.C. 480, 164 S.E.2d 168, a similar contention was presented. In that case a continuance from one term of superior court to another was allowed due to the illness of one of the State's witnesses. The defendant in that case argued that this was error because the State had another witness who would testify to the same circumstances as the absent witness. The Supreme Court overruled this contention on page 483 saying:

> "The case against this defendant was based on circumstantial evidence and neither the prosecution nor the defense could know what tests of credibility the jury might apply to the witnesses offered by the State."

The present case is substantially similar in that the State is relying on circumstantial, as well as direct, evidence to prove their case.

In *State v. Neas*, 278 N.C. 506, 180 S.E.2d 12, where a 15-month delay was allowed because essential evidence was detained in another case in another county, the Court said:

> "The probability of a delay is inherent in every criminal action, and the constitutional guarantee does not preclude good faith delays which are reasonably necessary for the State to present its case . . . " at p. 510.

4. *Prejudice to the defendant:* The only element of possible prejudice pointed to by the petitioner is the uncertainty of a couple of inconsequential responses by the State's witnesses, Officer Tucker and Officer Wynn. Officer Tucker did not testify that he saw the shot being fired by petitioner or that he saw the shot come from petitioner's room. Thus, whether or not he remembered saying that when the second shot was fired he was looking straight ahead on Friendly (Avenue), such is not a lapse of memory prejudicial to the petitioner. Similarly, the fact that Officer Wynn did not remember having asked the petitioner if he fired the rifle or had been otherwise involved in the shooting, is hardly a prejudicial lapse of memory. Though petitioner suggests that there was "a number of occasions on which witnesses were vague as to details or actually forgot what had happened," an examination of the record reveals no such vagueness or lapses of memory which could have prejudiced the petitioner in any way.

The assertion that the continuances were deliberately and unnecessarily caused by the State is without foundation and the reasons for the delays were justified and non-prejudicial.

Petitioner contends that the passage of time alone is sufficient to demand his release. He further contends that he need not show any prejudice. One of the four essential elements which petitioner must show is PREJUDICE. *State v. Ball*, 277 N.C. 714, 178 S.E.2d 377. Petitioner has not shown any prejudice in this case. The mere passage of time creates no prejudice. *State v. Wrenn*, 12 N.C. App 146, 182 S.E.2d 600. In the *Wrenn* case the defendant was arrested

on 15 July 1968 and tried in February of 1971, a period longer than the period present in the case at bar.

Petitioner was released after only 53 days of incarceration so there was no oppressive pretrial incarceration. There probably was some anxiety and concern of the accused, but the delay was justified as shown above. There is nothing in the record or elsewhere to indicate that the defense was in any way impaired by the delay. Prejudice, if it existed at all, was minimal.

The North Carolina Court of Appeals, applying the standards of *State v. Ball*, 277 N.C. 714, 178 S.E.2d 377, said as to this case:

> "In the present case, the defendant has failed to show the delay in bringing him to trial was due to the neglect or willfulness of the State, or that he was in any way prejudiced by the delay. The record reveals legitimate and reasonable excuses for any delay in bringing this defendant to trial. The defendant's motion to dismiss was properly denied. See *State v. Cavallaro*, 274 N.C. 480, 164 S.E.2d 168 (1968); *State v. Neas*, 278 N.C. 506, 180 S.E.2d 12 (1971); *State v. Wrenn*, 12 N.C. App. 146, 182 S.E.2d 600 (1971)." *State v. Berry*, 13 N.C. App. 310, 185 S.E.2d 463, cert den, 280 N.C. 722, 186 S.E.2d 925.

II.

PETITIONER WAS NOT TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE BY BEING TRIED FOR CONSPIRACY AND ASSAULT.

Petitioner contends that his constitutional right not to be twice placed in jeopardy for the same offense has been violated. The State disagrees. At page 171, 2 Strong, North Carolina Index, 2d, CONSPIRACY Sec. 3, it is said:

> "A conspiracy to do an unlawful act or to do a lawful act in an unlawful manner is a distinct and separate offense from the criminal acts committed pursuant to

the unlawful design." *State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891.

The unlawful agreement and not the execution of the agreement is the offense, *State v. Gallimore*, 272 N.C. 528, 158 S.E.2d 505, and a conspiracy to commit a felony is a felony. *State v. Horton*, 5 N.C. App. 141, 167 S.E.2d 871; affd 275 N.C. 651, 170 S.E.2d 466, cert den 398 U.S. 959, reh den 400 U.S. 857.

The doctrine of merger does not apply to conspiracy cases in this State. One authority states:

> "Unlike the case of a fatal blow struck with malice in which the battery is merged in the murder because it is an integral part of the homicide itself, a conspiracy is a distinct offense quite apart from the contemplated crime. Because of this fact the notion that a conspiracy is merged in the resulting offense is unsound and has been quite generally rejected in this country even if the conspiracy is a misdemeanor and the substantive offense a felony. A conspiracy, for example, is not a lesser included offense of which the defendant might be convicted although it was not mentioned in the indictment or information, and hence acquittal of the contemplated crime is no bar to conviction for the conspiracy to commit it." *Perkins on Criminal Law*, at 534 (1957). See: *Callanan v. United States*, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed. 2d 312.

Petitioner contends that the same facts must be proved to convict on the assault charge as well as the conspiracy charge. The evidence of the co-conspirator's statements are not essential to the assault case while it is essential to the conspiracy charge. The crime in the conspiracy count is the unlawful agreement, not the accomplishment of the unlawful act, while the assault charge is based on the unlawful act. For the foregoing reasons, the State contends that petitioner's contention of double jeopardy is meritless.

CONCLUSION

For the reasons stated above, it is respectfully submitted that

the petition for writ of certiorari should not be granted.

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